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No. 09-944

Supreme Court, U.S.
FILED
SEP 3 - 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

PLACER DOME, INC. AND BARRICK GOLD CORPORATION,

Petitioners,

v.

PROVINCIAL GOVERNMENT OF MARINDUQUE,

Respondent.

ON PETTTION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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September 3, 2010

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This supplemental brief is submitted in response to the Brief For The United States As Amicus Curiae. Even as it suggests that certiorari be denied, the government's amicus brief illustrates some of the strong reasons favoring this Court's review. Principal among them, the government recognizes that a circuit conflict does, in fact, exist on the standard for assessing federal subject matter jurisdiction under the rubric of the Act of State doctrine or the federal common law of foreign relations. The government's reasons for opposing certiorari notwithstanding that circuit conflict can be answered briefly.

1. Because the issue touches on sensitive aspects of our nation's relations with foreign governments, the legal principle on which the circuits are split is inherently important. In focusing instead on whether *this case* is sufficiently important (U.S. Am. Br. 9-10), the government misses a critical point. There should be no need to debate the relative significance of this case. The dispositive question at this juncture is: why wait for another case involving monumentally important foreign relations issues to wend its way to this Court: why subject another foreign government to the vagaries of litigation in United States courts on critical, vital issues of foreign relations before defining the reach of federal jurisdiction? Better to provide an answer now, so that the courts will have proper guidance at the outset to deal with another case that the government might regard as more consequential.

2. In referring throughout its brief to the Act of State doctrine, the government misses another pivotal aspect of this case. As the petition and reply brief explain, federal courts have conferred upon the term "Act of State doctrine" a definition that, by its very vagueness and opacity, engenders confusion. Originally crafted as a doctrine of defense employed to defeat jurisdiction, "Act of State" has been transported into a wholly different context as a potential basis for conferring federal jurisdiction. *See* Pet. 14-23; Reply Br. 9-11. And it is the Ninth Circuit that stands at the forefront of judicial efforts to employ "Act of State" terminology as a jurisdiction-conferring principle. *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), aff'd in part on other grounds, cert. dismissed in part, 538 U.S. 468 (2003). But, as this case illustrates, the analysis becomes wholly circular when the same standard is used to establish so-called "Act of State" jurisdiction and to defeat jurisdiction with the "Act of State" doctrine as a defense.

For that reason, resolution by this Court would provide vitally needed clarity. By employing the more precise nomenclature of "federal common law of foreign relations" to denote the jurisdiction-conferring principle, the "Act of State" doctrine could be restored to its original meaning – a prudential basis for abstaining from exercising jurisdiction when the legality of acts taken by foreign sovereigns within their own territory are challenged in a United States court. *See e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity

of the public acts a recognized foreign sovereign power committed within its own territory"); *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Under th[e act of state] doctrine, the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts").

3. The confusion generated by the term "Act of State" in the jurisdiction-conferring context is exemplified by the government's contention that petitioners did not raise the federal common law of foreign relations basis for jurisdiction in the Ninth Circuit. To make this point, the government quotes a heading from petitioner's Ninth Circuit brief. U.S. Am. Br. 12 n. 4 ("In The Alternative, The District Court Had Subject Matter Jurisdiction Under The Act Of State Doctrine"). But, the substantive discussion under that heading spoke expressly about the federal common law of foreign relations.[1] *See* Placer Dome Br. (CA9) at 53-54: "Under that doctrine, evaluations of the acts of foreign governments implicate the federal common law of foreign relations, giving rise to federal question jurisdiction, and are made exclusively by federal courts. *See Sabbatino*, 376 U.S. at 425 (law of international affairs and foreign relations 'should not

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[1] Moreover, the very first sentence of the brief stated: "The district court had jurisdiction under 28 U.S.C. §1331 based on the federal common law of foreign relations." *Id.* at 1.

be left to divergent and perhaps parochial state interpretations'); *Patrickson*, 251 F.3d at 799 ('Whether a foreign state's act is given legal force in the courts of the United States is a "uniquely federal" question directly implicating our nation's foreign affairs')."

It should come as no surprise that, in the course of discussing *Patrickson* in a Ninth Circuit brief, a party refers to the "Act of State" doctrine. The reason is simple: that is the terminology *Patrickson* employs in addressing an affirmative basis for creating jurisdiction. The Ninth Circuit's word choice – which informed its substantive decision in this case – goes directly to the underlying problem that the petition `asks this Court to solve.

4. The government also highlights the peculiarities of the "Act of State" nomenclature in the jurisdiction-conferring context when it cites, as a reason for denying certiorari, the absence of expressions of interest in the case by a foreign government. But, the plaintiff *is* a foreign government. Indeed, it is a foreign government suing *in its sovereign capacity* (Pet. App. 117a) to enforce its foreign law for events alleged to have occurred within its sovereign territory. And, it seeks injunctive relief to be implemented entirely within its sovereign territory. To say that more is required to establish a foreign relations (or "Act of State") nexus for jurisdiction is to miss the point entirely.

In any event, if more were needed, the record in this case would certainly suffice: in its district court filings, respondent, a foreign government, repeatedly acknowledged that there is indeed a valid

basis for federal jurisdiction because its complaint implicates United States foreign relations.[2] Under the standards applied in the Second, Fifth and Eleventh Circuits, the foreign government's complaint in this case plainly satisfies the requisites for federal subject matter jurisdiction. Accordingly, there is a conflict that this Court should resolve. Indeed, there is even greater need for review now than when the petition was filed. As several recent decisions reflect, the lower courts continue to be mired in the confusion generated by the vague boundaries between the multiple jurisdictional rubrics involved in this case. *See, e.g., Animal Sci. Prods. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, Civ. No. 05-4376 (GEB), 2010 U.S. Dist. LEXIS 35243, at *193-204, *295-298 (D.N.J. Apr. 1,

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[2] *See, e.g.*, Pet. App. 94a ("The question now for this Court is whether Placer Dome's rearticulation of its claim to 'foreign relations' subject matter jurisdiction has met its burdens, and overcome the statutory and Ninth Circuit presumptions against removal, by establishing that the dispute articulated in the Province's well-pleaded complaint so implicates our relations with foreign nations that this Court had subject matter jurisdiction over this action as of the time the complaint was filed.

"Has Placer Dome now met those burdens?

"Yes and No.

"Placer Dome does hit on some good points: (1) that this Court could be obliged to consider some aspects of Filipino regulation of the Philippine natural environment; (2) that the case involves the actions of former President Marcos; and (3) that the remedies at issue could have foreign relations implications"). *Id.* at 97a ("The bottom line is that this Court can find ... grounds to keep or remand this case") (emphasis in original).

2010); *Resco Prods. v. Bosai Minerals Group Co.*, Civil Action No. 06-235, 2010 U.S. Dist. LEXIS 54949, at *8-10, *18-21 (W.D. Pa. June 4, 2010); *In re Potash Antitrust Litig.*, 686 F. Supp. 2d 816, 824-825 (N.D. Ill. 2010). *See also Samantar v. Yousuf*, 130 S. Ct. 2278, 2290-2291 (2010).

5. With respect to the sequencing of issues under *Sinochem Int'l Co. v. Malay. Int'l Shipping Co.*, 549 U.S. 422 (2007), the government's amicus brief says not a word about the discretion vested in the court of appeals to chart the most efficient course to an obviously correct *forum non conveniens* dismissal. But *Pearson v. Callahan*, 129 S. Ct. 808 (2009), explicitly confers discretion on the court of appeals to conserve scarce judicial resources. In this case, there should have been no impediment in the court of appeals to proceeding directly to the *forum non conveniens* analysis on which the district court based its dismissal of the complaint.

Nor does the government address the standard for circuit court review of a district court's sequencing of issues. The basis for the Ninth Circuit's decision to adjudicate subject matter jurisdiction first was its view that the issue was "not particularly complex." Pet. App. 10a. The petition and reply brief explain why that facile assessment is incorrect. Pet. 11-14; Reply Br. 5-8. Even respondent conceded that judicial determination of subject matter jurisdiction was complex, time-consuming and difficult. *See, e.g.*, Plaintiff's Motion for Order to Show Cause Why This Action Should Not be Remanded to State Court, filed March 17, 2006 (9th Cir. Excerpt of Record, Vol. 11 at 2185): "[The

Province] filed this action in Nevada state court, a court of general jurisdiction, to avoid any time and money-wasting controversies over whether this action, as of the time of its filing, could also be made to fit within the much more limited jurisdiction of the federal courts."

Of course, the key practical teaching of *Sinochem, Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), and *Pearson* is that there is an available means to avoid the inefficient proliferation of proceedings that the Ninth Circuit required when it returned this case to state court. Even now, the state court is in the process of replowing the *forum non conveniens* ground that the federal district court had decided correctly.

In the final analysis, this case presents an opportunity for this Court to resolve an important issue of subject matter jurisdiction on which the circuits are in conflict, and a prudential issue of efficient judicial administration on which a pressing need exists for guidance to federal trial and appellate courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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